LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 21 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-317

Docket No. 1862

BEN D. LEUTY, *Petitioner,*

v.

THE STATE OF NEW JERSEY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF NEW JERSEY, MIDDLESEX COUNTY

SIMON H. RIFKIND
Attorney for Petitioner
A Member of the Firm of
Paul, Weiss, Goldberg,
Rifkind, Wharton & Garrison
345 Park Avenue
New York, New York 10022

Of Counsel:

PAUL J. NEWLON
JAY GREENFIELD
NEIL H. COGAN

Dated: June 21, 1971
New York, New York

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	6
I. *Bartkus* v. *Illinois* should not be expanded to permit successive Federal and State prosecutions predicated on the same State penal statute and the same conduct	8
II. *Bartkus* should be overruled	14
Conclusion	22

TABLE OF AUTHORITIES

CASES:

Abbate v. *United States*, 359 U.S. 187 13
Ashe v. *Swenson*, 397 U.S. 436 ..... 18, 19, 20, 21
Bartkus v. *Illinois*, 359 U.S. 121 ..... 2, 6, 7, 9, 10, 11, 13, 14, 16, 17, 18, 20, 21
Benton v. *Maryland*, 395 U.S. 784 ..... 9, 16, 18, 20, 21
Brady v. *Maryland*, 373 U.S. 83 8
Edwards v. *California*, 314 U.S. 160 8
Fox v. *Ohio*, 5 How. (46 U.S.) 410 10
Green v. *United States*, 355 U.S. 184 ..... 16, 18, 19
Houston v. *Moore*, 5 Wheat. (18 U.S.) 1 10
Hudson Distributors v. *Eli Lilly & Co.*, 377 U.S. 386 7
Local No. 438, Construction & General Laborers Union v. *Curry*, 371 U.S. 542 ..... 7, 8
Malloy v. *Hogan*, 378 U.S. 1 ..... 17, 21

Page

Mercantile National Bank v. *Langdeau*, 371 U.S. 555 7
Mitchell v. *Trawler Racer, Inc.*, 362 U.S. 539 22
Murphy v. *Waterfront Comm'n*, 378 U.S. 52 ....17, 18, 19, 20, 21
Nielsen v. *Oregon*, 212 U.S. 315 16
Organization for a Better Austin v. *Keefe*, —— U.S. —— 8
Palko v. *Connecticut*, 302 U.S. 319 .....15, 16, 17
Pérez v. *United States*, —— U.S. —— 11, 14
Petite v. *United States*, 361 U.S. 529 12
Price v. *Georgia*, 398 U.S. 323 ..... 7, 16
Rosenblatt v. *American Cyanamid Co.*, 86 S.Ct. 1 .. 8
State v. *Cooper*, 54 N.J. 330, 255 A.2d 232 6
The Boys Markets, Inc. v. *Retail Clerks Union*, 398 U.S. 235 21
United States v. *Ball*, 163 U.S. 662 7
United States v. *Furlong*, 5 Wheat. (18 U.S.) 184 .. 16
Ullmann v. *United States*, 350 U.S. 422 18
United States v. *Jorn*, 400 U.S. 470 18
United States v. *Lanza*, 260 U.S. 377 .....15, 17, 21
United States v. *Nardello*, 393 U.S. 286 11
Wade v. *Hunter*, 366 U.S. 684 19
Waller v. *Florida*, 397 U.S. 387 .....15, 21

CONSTITUTIONAL PROVISIONS CITED:

U.S. Const., Amend. V 2
U.S. Const., Amend. XIV 2

STATUTES CITED:

18 U.S.C. § 891 14
18 U.S.C. § 922(b)(2) 14
18 U.S.C. § 1511 14
18 U.S.C. § 1952 .....2, 3, 4, 11, 13
18 U.S.C. § 1955 14
18 U.S.C. § 1961 14
18 U.S.C. § 1962 14
28 U.S.C. § 1257(3) 2, 7
N.J.S.A. 2A: 93-6 ..... 2, 3
N.J.S.A. 2A: 85-7 13

Page

MISCELLANEOUS:

Franck, "An International Lawyer Looks at the Bartkus Rule," 34 N.Y.U.L. Rev. 1096 21
Griswold, E., The Fifth Amendment Today 18
Model Penal Code, § 1.10(1)(a) 12
Note, "Dual Prosecutions by State and Federal Governments: Another Exercise in Federalism," 80 Harv. L. Rev. 1538, 1542-43 12
Pontikes, "Dual Sovereignty and Double Jeopardy: A Critique of *Bartkus* v. *Illinois* and *Abbate* v. *United States*," 14 West. Res. L. Rev. 700 .....12, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Docket No.

BEN D. LEUTY, *Petitioner,*

v.

THE STATE OF NEW JERSEY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF NEW JERSEY, MIDDLESEX COUNTY

Petitioner Ben D. Leuty respectfully prays that a writ of certiorari issue to review the judgment of the Superior Court of the State of New Jersey, Middlesex County, entered December 8, 1969. That judgment denied petitioner's motion to dismiss an indictment on the ground of double jeopardy. It is appended as Appendix A hereto.

OPINION BELOW

The opinion of the Superior Court has not been reported. It is appended as Appendix B hereto.

JURISDICTION

The judgment of the Superior Court, Middlesex County, was entered December 8, 1969. Leave to appeal that judgment was denied by orders of the Appellate Division of the Superior Court January 15, 1970, and by the Supreme Court of New Jersey March 22, 1971. Those orders are appended as Appendix C hereto. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. The Federal authorities having already tried petitioner for alleged violation of the New Jersey bribery statute, N.J.S.A. 2A:93-6 (by authority of 18 U.S.C. § 1952), may New Jersey retry him, under a virtually identical indictment, for the same alleged violation of the identical statute by the same conduct?

2. Should *Bartkus* v. *Illinois*, 359 U.S. 121, be expanded to permit New Jersey so to place petitioner again in jeopardy?

3. Should *Bartkus* be overruled?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amend. V:

> "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

U.S. Const., Amend. XIV:

> ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

N.J.S.A. 2A: 93-6:

"Any person who directly or indirectly gives or receives, offers to give or receive, or promises to give or receive any money, real estate, service or thing of value as a bribe, present or reward to obtain, secure or procure any work, service, license, permission, approval or disapproval, or any other act or thing connected with or appertaining to any office or department of the government of the state or of any county, municipality or of any public authority, is guilty of a misdemeanor."

* * *

18 U.S.C. § 1952:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

* * *

"(3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in [subparagraph] . . . (3), shall be fined not more than . . . $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means . . . (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

* * *

STATEMENT OF THE CASE

In February 1967 petitioner Leuty was accused by a Federal grand jury in New Jersey, along with nine co-defendants, of committing bribery and conspiring to commit bribery in violation of New Jersey Statute 2A: 93-6. Federal jurisdiction was premised on 18

U.S.C. § 1952. The Federal indictment charged petitioner with seven substantive violations of New Jersey's bribery statute and with participation in two conspiracies to violate that statute (see Appendix D hereto).

The crimes alleged arose out of the construction of a pipeline system by Colonial Pipeline Company, of which petitioner was president. The project required a terminal facility in Woodbridge, New Jersey. The Government alleged, and petitioner conceded, that certain payments were made to Woodbridge public officials. The Federal indictment charged that the payments were bribes. Petitioner's defense was that they were shakedowns coerced from Colonial Pipeline by Woodbridge officials. Petitioner, as president of Colonial Pipeline, was charged with having authorized the payments to the Woodbridge officials.

The Federal trial lasted ten weeks. Petitioner conceded the involvement of interstate facilities. The sole disputed factual issue at trial, so far as petitioner was concerned, was whether he had acted with the corrupt intent that is a necessary element of the offense of bribery under New Jersey law.[1] For petitioner, the issues in dispute at the Federal trial involved only questions of State law—questions arising because the Federal indictment incorporated the New Jersey bribery statute. Thus, counsel for the Government and petitioner argued questions of interpretation and application of the New Jersey statute; the District

---

[1] Petitioner's defense was that he lacked this intent and that he was the victim of a shakedown. It was his claim that he acted in response to the coercion of the town officials and from fear of injury to his company.

Court charged the jury extensively on New Jersey law and drew its definition of the offense of bribery from New Jersey court decisions.

In January 1969 the Federal jury acquitted petitioner of the seven substantive charges, but convicted him on the two conspiracy counts.[2]

Less than two weeks after the Federal jury brought in its verdict, and two years after the Federal indictment was returned, a New Jersey grand jury returned an indictment against petitioner arising from the identical transactions and charging the identical offenses that had been at issue in the Federal trial. For all practical purposes, the New Jersey indictment now pending against petitioner is a photocopy of its Federal counterpart. Aside from the deletion of the allegations relating to interstate facilities and the removal of two substantive charges as to which the State statute of limitations had run, the State indictment virtually tracks the Federal indictment—word for word, detail for detail. The two indictments are set out in Appendix D side by side for this Court's comparison.[3]

Thus, although he has once "run the gauntlet" on seven substantive charges and two conspiracy charges drawn under the New Jersey bribery statute, and has undergone a ten-week trial on those charges, petitioner is about to undergo a second trial on the same charges under that statute. The State prosecutor is about to

---

[2] On appeal, the Court of Appeals for the Third Circuit has vacated petitioner's conspiracy convictions on the ground that the federal grand jury was improperly impanelled. The Government has sought rehearing of that decision, but the Court of Appeals has not yet acted on the application.

[3] A defendant in the Federal action who was granted immunity at the outset of the Federal trial was not indicted by the State.

have the opportunity to try to convict petitioner—not only on the substantive charges where the Federal prosecutor failed, but on the conspiracy charges where the Federal prosecutor succeeded.

Petitioner has sought but failed to persuade the New Jersey courts that subjecting him to trial under the pending State indictment will violate his Federal constitutional rights. The Superior Court of New Jersey has denied petitioner's motion for an order dismissing the State indictment on the ground that the upcoming trial will place him twice in jeopardy. In so doing, the State court has relied upon an expansive interpretation of this Court's decision in *Bartkus* v. *Illinois,* 359 U.S. 121, together with a subsequent New Jersey decision invoking that authority.[4] The intermediate and highest appellate courts in New Jersey have declined to review the Superior Court's decision.

Application for a stay of State proceedings pending the filing of this petition, presented to Mr. Justice Brennan as Circuit Justice, was denied by him April 23, 1971.[5]

REASONS FOR GRANTING THE WRIT

The judgment below rests solely upon an expansive interpretation of this Court's prior decision in *Bartkus* v. *Illinois,* 359 U.S. 121. But nothing in *Bartkus* sanctions successive Federal and State prosecutions predicated upon the same State penal statute. And

---

[4] *State* v. *Cooper,* 54 N.J. 330, 255 A.2d 232 (1969).

[5] Petitioner understands that other co-defendants named in the State indictment who unsuccessfully moved to dismiss will also seek this Court's review of the judgment below.

the validity of *Bartkus* is now in doubt in light of subsequent decisions of this Court. The Court thus should grant the writ at least to clarify the reach of *Bartkus* and, if necessary, to consider whether *Bartkus* should be overruled.

The judgment sought to be reviewed is final for purposes of this Court's jurisdiction. See 28 U.S.C. § 1257(3). The New Jersey Superior Court's denial of petitioner's motion to dismiss the State indictment on grounds of double jeopardy conclusively determines that petitioner must undergo a second trial. If petitioner is correct on the merits of his constitutional argument, then the mere holding of that trial will destroy his Federal constitutional rights. Subsequent review could not redress the denial of those rights. Review would only be available to prevent double punishment; it would come too late to prevent double jeopardy. The double jeopardy prohibition "is not against being twice punished, but against being twice *put* in jeopardy . . . ." *Price* v. *Georgia,* 398 U.S. 323, 326, quoting *United States* v. *Ball,* 163 U.S. 662, 669 (emphasis supplied in *Price*).

The judgment below thus determines "a separate and independent matter" from petitioner's guilt or innocence, "anterior to the merits and factual and legal issues of [New Jersey's] cause of action." *Mercantile National Bank* v. *Langdeau,* 371 U.S. 555, 557-58. The Court should now resolve whether petitioner must undergo a second trial, and thus be subjected to "long and complex litigation which may be for naught if consideration of the preliminary question . . . is postponed until the conclusion of the proceedings." *Id.* at 558. See also *Hudson Distributors* v. *Eli Lilly & Co.,* 377 U.S. 386, 389 n. 4; *Local No. 438, Construc-*

tion & General Laborers Union v. *Curry*, 371 U.S. 542, 548-52.[6]

The present petition for review satisfies the criteria for finality that the Court has previously prescribed. There is no indication that the New Jersey courts have applied a less rigorous standard in arriving at the judgment below than will be the case in any judgment they may reach following petitioner's retrial; a second trial could not reveal further facts or legal arguments bearing upon the question now tendered for review; and the decision of the New Jersey court threatens a substantial invasion of a central constitutional guaranty—the prohibition against multiple prosecutions for the same offense. See *Organization for a Better Austin* v. *Keefe*, —— U.S. ——, —— n., 39 U.S.L.W. 4577, 4578 n. (May 17, 1971). And see *Rosenblatt* v. *American Cyanamid Co.*, 86 S. Ct. 1, 3.

I. Bartkus v. Illinois Should Not Be Expanded To Permit Successive Federal and State Prosecutions Predicated on the Same State Penal Statute and the Same Conduct.

Petitioner has undergone a ten-week Federal trial, following which the jury has acquitted him of seven substantive charges based on the New Jersey anti-bribery statute and convicted him of two conspiracy charges of conspiracy to violate that statute. Now New Jersey proposes to try petitioner again under the same State statute with respect to both the sub-

[6] Generally, the final judgment in a State criminal proceeding is the sentence or judgment of conviction. *E.g.*, *Edwards* v. *California*, 314 U.S. 160, 171. But the Court has recognized exceptions to that rule. One such exception arises where, as here, the issue presented for review represents " 'a serious and unsettled question' . . . 'independent of, and unaffected by', . . . what many transpire" at a second trial. *Brady* v. *Maryland*, 373 U.S. 83, 85 n. 1.

stantive charges on which he was acquitted and the conspiracy charges on which he was convicted.[7] In permitting the State to go forward, the Court below has relied exclusively on this Court's prior decision in *Bartkus* v. *Illinois*, 359 U.S. 121. But nothing in *Bartkus* permits such a flagrant departure from the basic constitutional guaranty against double jeopardy.

In *Bartkus* a sharply divided Court upheld petitioner's State conviction for robbery even though he had previously been tried and acquitted in a Federal court on a charge, arising from the same events, of robbing a Federally insured savings and loan association. The dual bases of decision in *Bartkus* were the no longer valid propositions that the Fifth Amendment's protection against double jeopardy did not apply to the States as such (359 U.S. at 124), and that the double prosecution there presented did not offend Fourteenth Amendment due process (*id.* at 131).

The holding concerning due process in *Bartkus* rested on the proposition that the Federal and State governments were dual sovereigns, each with its own interests to preserve and each with the power to enforce those interests through criminal sanctions. Es-

[7] The fact that the United States Court of Appeals for the Third Circuit has vacated petitioner's conspiracy convictions has no bearing on the issues here tendered for review. Petitioner cannot be retried in the Federal courts on the substantive counts, as to which he was acquitted, even though the underlying indictment has subsequently been held invalid. *Benton* v. *Maryland*, 395 U.S. 784, 796-97. And, if it were assumed *arguendo* that petitioner might be retried in the Federal court on the conspiracy counts, as to which he was convicted (an assumption petitioner rejects), the concept of "continuing jeopardy" that might permit retrial applies only to the court where prosecution began and cannot sanction the institution of duplicative criminal proceedings in another jurisdiction. See *Price* v. *Georgia*, 398 U.S. 323, 326.

sential to decision in *Bartkus* was the notion that the burden of dual trials and the imposition of dual penalties arising from a single transaction or event were justified because that transaction or event had offended the separate—and different—concerns of each of two governing authorities. Thus, in *Bartkus* itself, the Federal interest in preserving the financial integrity of Federally insured savings and loans associations was found to differ from the State interest in deterring and punishing the act of armed robbery.[8]

Indeed, even the majority in *Bartkus* recognized an exception to its general rule "in a case in which the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the courts of another government empowered to try that question" (359 U.S. at 130, citing *Houston* v. *Moore,* 5 Wheat. (18 U.S.) 1 (footnote omitted)).

This case is that exception. The State Government is about to subject petitioner to a "second trial" for an alleged "violation of the very statute whose violation by the same conduct has already been tried in [a Federal court] . . . empowered to try that question." The sole difference between the Federal and State cases here is that the Federal indictment alleged the involvement of interstate commerce. At the Federal trial that extra issue was surplusage so far as petitioner was concerned. Petitioner conceded its pres-

[8] *Bartkus* relied upon the prior decision in *Fox* v. *Ohio,* 5 How. (46 U.S.) 410, where the Court had concluded that "both the Federal and State Governments retained the power to impose criminal sanctions [for the utterance of counterfeit money], the United States because of its interest in protecting the purity of its currency, the States because of their interest in protecting their citizens against fraud" (359 U.S. at 129).

ence in his case and there was no dispute about the matter. In essence, it amounted to a mere jurisdictional prerequisite to the maintenance of a prosecution based upon New Jersey law.

This identity of the Federal and State cases comes as no surprise. For the thrust of § 1952, as this Court has previously recognized, is not the protection of an independent Federal interest but the "backstopping" of State interests in situations where, for one reason or another, the States are unable to fend for themselves. Thus, in *United States* v. *Nardello,* 393 U.S. 286, the Court noted that the Attorney General had told the Senate Committee on the Judiciary that "the purpose of [§ 1952] . . . was to aid local law enforcement officials . . . . [B]y creating a federal interest in limiting the interstate movement necessary to . . . operations [of criminal elements], criminal conduct beyond the reach of local officials could be controlled" (393 U.S. at 290-91). The Court concluded that at the heart of the Congressional intent was the purpose "to aid local law enforcement officials . . . ." *Id.* at 293-94.

But surely the fact that the Federal Government may prosecute *in place of* State action does not mean that *Bartkus* should be expanded to permit the State to prosecute *in addition to* the Federal Government. *Bartkus* rested on the conclusion that the institutional interests of State and Federal Governments outweighed the individual interests protected by the constitutional guaranty against double jeopardy. The interest in federalism diminishes dramatically, if it does not vanish, when State and Federal Governments engage in duplicate enforcement of local law. *Cf. Perez* v. *United*

States, —— U.S. ——, ——, 39 U.S.L.W. 4484, 4488 (April 27, 1970) (Stewart, J., dissenting).[9]

Indeed, the Federal Government has expressly disclaimed any Federal interest in duplicative prosecutions. Shortly after *Bartkus* was decided, the Attorney General stated that "it is the general policy of the Federal Government that 'several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement.'" *Petite* v. *United States,* 361 U.S. 529, 530. This policy is "closely related to that against duplicating federal-state prosecutions." *Id.* at 531.

There would have been no danger of duplicative prosecutions if New Jersey had not delayed prosecuting petitioner under its bribery statute. If the State had brought petitioner to trial before the Federal trial commenced, the Federal Government, under its established policy, would not have gone forward with its action. See *Petite* v. *United States, supra.* The State had ample opportunity to do this. The Federal indictment, which was given wide publicity, was issued in February 1967, and the Federal trial did not commence until November 1968. However, instead of acting to enforce its bribery laws, New Jersey waited until February 1969, after petitioner

[9] See also Note, "Dual Prosecutions by State and Federal Governments: Another Exercise in Federalism," 80 Harv. L. Rev. 1538, 1542-43; Pontikes, "Dual Sovereignty and Double Jeopardy: A Critique of *Bartkus* v. *Illinois* and *Abbate* v. *United States,*" 14 West. Res. L. Rev. 700, 712-17; Model Penal Code, Section 1.10(1)(a) (first prosecution a bar unless "the law defining each of [the] . . . offenses is intended to prevent a substantially different harm or evil").

had been tried under those laws in the Federal court. Thus, petitioner's constitutional rights are now endangered only because New Jersey, having elected to stand aside for two years while the Federal Government prosecuted petitioner under the State bribery statute, now wants to repeat the prosecution and put him again in jeopardy.

Confining *Bartkus* so as not to permit the threatened prosecution will give rise to none of the evils feared by the Court in *Bartkus's* companion case, *Abbate* v. *United States,* 359 U.S. 187. There the petitioners had conspired to blow up communications transmission towers in Missouri. The Court sustained a Federal prosecution for interference with communication systems of the Federal Government following a State trial and conviction for destroying private property. The *Abbate* Court was concerned that to foreclose Federal prosecution in the circumstances there presented could deprive the national government of the authority to protect an interstate communication system through a State's prior assertion of jurisdiction followed by a sham trial or nominal penalty. See 359 U.S. at 202 n. 2.

Here, however no one suggests that petitioner's ten-week Federal trial was a hoax. Moreover, both the Federal and State penalties for substantive and conspiracy violations of New Jersey's bribery statute are substantial.[10] More importantly, however, *Abbate*'s

[10] The maximum penalties for a substantive violation of § 1952 and for a conspiracy to violate that section as forbidden in 18 U.S.C. § 371 are a $10,000 fine and a five-year imprisonment. The corresponding penalties for both the substantive and conspiracy violations of New Jersey's anti-bribery statute are a maximum of $1000 and a three-year imprisonment, N.J.S.A. 2A:85-7.

concerns do not arise where, as here, both prosecutions are based on the same alleged violation of the same statute by the same conduct. Where a "backstop" statute is involved, there are no separate Federal and State interests to protect. Thus, where the Federal Government has vigorously prosecuted petitioner for violating New Jersey's bribery statute, denying New Jersey the opportunity to retry him cannot deprive it of the protection of its interest.

To interpret *Bartkus,* or *Abbate,* otherwise would give rise to pernicious consequences. For the Federal Government has now increasingly involved itself in local law enforcement. Only last Term the Court dealt with the Consumer Credit Protection Act, 18 U.S.C. §§ 891 *et seq.,* where Congress has, among other things, outlawed "loan sharking" without any requirement that an individual defendant be proved to have used interstate facilities or to have affected them. *Perez* v. *United States, supra.* Other examples of the new breed of Federal criminal statute, either duplicating State criminal law or merely incorporating it wholesale, abound in Title 18 of the United States Code. Some of them, as in § 1952, expressly mandate an interstate nexus; others, as in the section involved in *Perez,* do not.[11]

The questions presented by this petition will therefore arise in prosecutions under a large number of Federal and State statutes. Petitioner respectfully submits that the Court should take this opportunity to resolve these questions, both to do justice to pe-

---

[11] See, *e.g.,* 18 U.S.C. § 922(b)(2) (sale of firearms in violation of State law); 18 U.S.C. § 1511 (conspiracy to obstruct state criminal laws to facilitate violation of State laws); 18 U.S.C. § 1955 (gambling business in violation of State law); 18 U.S.C. §§ 1961, 1962 (use of income derived from violation of State law).

titioner and to guide those engaged in the administration of criminal justice.

II. Bartkus Should Be Overruled

For the reasons above set forth, *Bartkus,* properly read, does not permit the threatened prosecution. But the decisions of the Court subsequent to *Bartkus* have brought it so far into question that the Court should now reconsider the case with a view to overruling it.

The decision in *Bartkus* rested on the standard elaborated in *Palko* v. *Connecticut,* 302 U.S. 319. On the "fundamental fairness" test there set forth, the *Bartkus* Court concluded that "successive state and federal prosecutions for different crimes arising from the same acts [were not] . . . repugnant to those standards of outlawry which offend the conception of due process" (359 U.S. at 131). That analysis derived from the conclusion last articulated in *United States* v. *Lanza,* 260 U.S. 377, that the Federal and State Governments were "dual sovereignties," each entitled to assert its own authority to protect its interests by criminal prosecution (*id.* at 128-34).

Four Justices dissented in *Bartkus.*[12] Subsequent decisions of the Court have eroded the doctrinal basis of *Bartkus* and established that it is no longer valid law.

1. In *Waller* v. *Florida,* 397 U.S. 387, the Court ruled that the "dual sovereignty" argument could not support successive prosecutions by State and local au-

[12] Mr. Justice Black, speaking for himself, Mr. Chief Justice Warren, and Mr. Justice Douglas, would have applied the constitutional prohibition against double jeopardy directly to the States (359 U.S. at 151-55). Mr. Justice Brennan, with whom the Chief Justice and Mr. Justice Douglas joined, dissented on the ground that the extent of participation of federal authorities in furthering the subsequent state prosecution turned the state trial into a second federal prosecution (*id.* at 165-66).

thorities for an offense against a State statute and municipal ordinance arising from a single act or transaction. In declining to extend the *Bartkus* rationale to the case before it, the *Waller* Court returned to the long-standing rule that the double jeopardy prohibition bars prosecutions by different Governments. *Nielsen* v. *Oregon*, 212 U.S. 315, 320 (successive prosecutions by States); *United States* v. *Furlong*, 5 Wheat. (18 U.S.) 184, 197 (prosecution by the Federal Government following prosecution in another country). The decision in *Waller* thus leaves *Bartkus* more an anomaly in the law than ever before.

2. In *Benton* v. *Maryland*, 395 U.S. 784, the Court expressly overruled the *Palko* decision upon which *Bartkus* rested (395 U.S. at 794). The Court concluded that the prohibition against double jeopardy contained in the Fifth Amendment "represents a fundamental ideal in our constitutional heritage . . . and . . . should apply to the states through the Fourteenth Amendment" (*ibid.*). Mr. Justice Marshall, speaking for the *Benton* Court, reviewed the fundamental nature of the constitutional guaranty, traced its origins to ancient times and its establishment in the common law of England, and pointed to its universal inclusion in the Federal and State constitutions of this country (*id.* at 795).[13]

---

[13] "As this Court put it in *Green* v. *United States*, 355 U.S. 184, 187-88 (1957), '[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it is clearly 'fundamental to the American scheme of justice.'" *Id.* at 795-96.

The destruction of *Palko* encompasses its progeny as well. *Bartkus,* being of "the same genre" as *Palko,* necessarily shared *Palko's* fate in *Benton. Price* v. *Georgia,* 398 U.S. 323, 330 n. 9.

3. Just as the "due process" rationale of *Palko* has been repudiated, so the "dual sovereignty" reasoning of *Lanza* has been rejected, in *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52. *Murphy* followed upon the Court's ruling in *Malloy* v. *Hogan,* 378 U.S. 1, that the Fifth Amendment privilege against self-incrimination applies to the States through the Fourteenth Amendment. The *Murphy* Court held that in light of the *Malloy* decision, the old "dual sovereignty" argument could no longer justify the notion that the States could compel inculpatory testimony without regard to the consequences under Federal law for the person compelled.

In reaching its conclusion, the *Murphy* Court took note of the fundamental nature of the constitutional guaranty involved; it pointed to the danger of "whipsawing" a witness into incriminating himself before both State and Federal authorities, even though the constitutional guaranty was applicable to each; it recognized that *Malloy,* by applying the constitutional guaranty to the States, compelled reconsideration of the "established rule" hitherto governing the issue before it; and it reviewed the historic basis upon which that "established rule" rested, revealing the inaccuracies and shortcomings of prior analysis.

A similar process here compels the conclusion that *Bartkus,* along with the *Lanza* decision upon which *Bartkus* rests, is not good law.

(a) Just as the privilege against self-incrimination stands as "one of the great landmarks in man's strug-

gle to make himself civilized,"[14] and reflects fundamental values in the structuring of the relationship between the individual and his government, so does the prohibition against double jeopardy represent a central value in our constitutional scheme. See *Benton* v. *Maryland, supra; Bartkus* v. *Illinois, supra* (Black, J., dissenting). As Mr. Justice Brennan has recently said, "The Double Jeopardy Clause is a guarantee 'that the State with all its resources and power [shall] not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a constant state of anxiety and insecurity . . . .'" *Ashe* v. *Swenson,* 397 U.S. 436, 450 (concurring opinion), quoting *Green* v. *United States,* 355 U.S. 184, 187.[15] See also *United States* v. *Jorn,* 400 U.S. 470, 479 (opinion of Harlan, J.).[16]

---

[14] E. Griswold, *The Fifth Amendment Today,* 7 (1955), quoted in *Murphy* v. *Waterfront Comm'n, supra,* at 55, and *Ullmann* v. *United States,* 350 U.S. 422, 426.

[15] These considerations have led Mr. Justice Brennan to conclude that "abuse of the criminal process is foremost among the feared evils which led to the inclusion of the Double Jeopardy Clause in the Bill of Rights. That evil will be most effectively avoided, and the Clause can thus best serve its worthy ends, if [the constitutional phrase] 'same offense' is construed to embody the 'same transaction' standard" (397 U.S. at 459-460).

[16] "The Fifth Amendment's prohibition against placing a defendant 'twice in jeopardy' represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings. A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. Both of these considerations are expressed in *Green* v. *United States,* 355 U.S.

(b) The *Murphy* Court noted the risk of "whipsawing" between the State and Federal governments—an evil resulting in the effective deprivation of a constitutional guaranty through the action of State and Federal Governments together that neither could accomplish if acting alone. The identical danger exists in this case. The petitioner is about to undergo an arduous trial, based on the same transactions and founded on the same State statute that underlay the ten-week ordeal in the Federal court. If New Jersey is permitted to proceed on this indictment, Federal and State prosecutors will have mounted successive prosecutions based on the same State statute for the same conduct. *Cf.* Mr. Justice Brennan, concurring in *Ashe* v. *Swenson,* 397 U.S. at 460. Already the state prosecutor is in position to "organize . . . [his] . . . case for the second trial to provide the links missing in the . . . evidence that was offered at the first trial" (*id.* at 459 (Brennan, J. concurring)). The first trial will be treated "as no more than a dry run for the second prosecution" (*id.* at 447 (opinion of the Court)).

The danger of "whipsawing" has become especially real "in our age of 'cooperative federalism' where the federal and state governments are waging a united front against many types of criminal activity." *Murphy,* 378 U.S. at 55-56 (footnote omitted). As the Court has recently had occasion to observe:

> "In more recent times, with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to

184, 187-188 (1957) . . . . These considerations have led this Court to conclude that a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge. See *Green* v. *United States, supra,* at 188; *Wade* v. *Hunter,* 336 U.S. 684, 688 (1949)" (footnote omitted), *Jorn, supra.*

> spin out a startlingly numerous series of offenses from a single alleged criminal transaction . . . . As the number of statutory offenses multiplied, the potential for unfair and abusive reprosecutions became far more pronounced." *Ashe* v. *Swenson*, 397 U.S. 436, 445 n. 10.

(c) The *Murphy* Court held that its decision in *Malloy*, applying the privilege against self-incrimination to the States, compelled reconsideration of the "established rule" that the constitutional privilege did not protect a witness in one jurisdiction against the compulsion to give testimony that could be used to convict him in another jurisdiction (378 U.S. at 57). The same consideration obtains here. The Court's decision three Terms ago in *Benton*, enforcing the double jeopardy guaranty against the States, necessitates a similar review of the "established rule" that a Federal trial followed by conviction or acquittal raises no bar to a subsequent State trial for the same conduct. As the Court recognized in *Ashe* v. *Swenson*, *supra*, "the doctrine of *Benton* v. *Maryland* . . . puts the [double jeopardy issue] . . . in a perspective quite different from that in which the issues were perceived" when only considerations of Fourteenth Amendment "due process" were thought pertinent (397 U.S. at 442).

(d) Finally, the *Murphy* Court reviewed the historical basis and legal analysis upon which the prior decisions there under review had rested. That analysis revealed the inadequacies of reasoning—and even simple errors in the reading of precedent—that had unfortunately given rise to past decisions of the Court. Just such inadequacies and errors underlie the *Bartkus* decision. The English common law precedents are far from dubious, as the *Bartkus* Court thought, 359 U.S. at 128 n. 9; they clearly reject the "dual sovereignty"

theory.[17] The "precedents" upon which the decision in *Lanza* rested, and upon which the *Bartkus* Court in turn relied, are without exception either dicta or simply inapplicable.[18]

In sum, just as *Malloy* compelled the reconsideration and repudiation of former law in *Murphy,* so should *Waller* and *Benton* lead to the rethinking of *Bartkus* in this case.

The time is ripe to overrule *Bartkus.* It was unsound at the outset, and its analytical underpinnings have been destroyed by subsequent decisions of the Court. The passage of time often reveals the propriety of revising and overruling of precedent. See, *e.g., The Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235, 241-43. See also *id.* at 255 (Stewart, J., concurring). Such review is particularly appropriate where constitutional guaranties are at stake, and past decisions are not subject to legislative correction. "The Court has not hestitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservations of basic liberties than that which was contemplated by its framers when they added the Amendment to our constitutional scheme." *Malloy* v. *Hogan,* 378 U.S. 1, 5.

Just as "it would be incongruous to have different standards determine the validity of a claim of double jeopardy depending upon whether the claim was asserted in a state or federal court," *Ashe* v. *Swenson,* 397 U.S. 436, 450 (Brennan, J., concurring), so it is

---

[17] See discussion in Franck, "An International Lawyer Looks at the Bartkus Rule," 34 N.Y.U.L. Rev. 1096 (1959).

[18] See Discussion in Pontikes, "Dual Sovereignty and Double Jeopardy: A Critique of *Bartkus* v. *Illinois* and *Abbate* v. *United States,*" 14 W. Res. L. Rev. 700, 706-10.

now incongruous to permit the sterile "dual sovereignty" formula to place a defendant "twice . . . in jeopardy" for a single act.

As Mr. Justice Frankfurter had occasion to say:

> "When it appears that a challenged doctrine has been uncritically accepted as a matter of course by the inertia of repetition—has just 'grow'd' like Topsy—the Court owes it to the demands of reason, on which judicial law-making power ultimately rests for its authority, to examine its foundations and validity in order appropriately to assess claims for its extension." *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 551 (dissenting opinion).

CONCLUSION

For the foregoing reasons, petitioner prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

SIMON H. RIFKIND
Attorney for Petitioner
A Member of the Firm of
Paul, Weiss, Goldberg,
Rifkind, Wharton & Garrison
345 Park Avenue
New York, New York 10022

Of Counsel:

PAUL J. NEWLON
JAY GREENFIELD
NEIL H. COGAN

Dated: June 21, 1971
New York, New York